

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRANDON DE'AUNDRE CLIFTON,

Plaintiff,

-against-

STATE OF NEW YORK; NEW YORK STATE
DEPARTMENT OF HEALTH; FEDERAL
COMMUNICATIONS COMMISSION; NEW
YORK STATE POLICE DEPARTMENT,

Defendants.

23-CV-10257 (LTS)

ORDER TO AMEND

LAURA TAYLOR SWAIN, Chief United States District Judge:

Plaintiff, who is appearing *pro se*, brings this action alleging that Defendants violated his “constitutional and statutory rights.” (ECF 1 at 1.) By order dated November 22, 2023, the Court granted Plaintiff’s request to proceed *in forma pauperis* (“IFP”), that is, without prepayment of fees. For the following reasons, the Court directs Plaintiff to file an amended complaint within 60 days from the date of this order.

STANDARD OF REVIEW

The Court must dismiss an IFP complaint, or portion thereof, that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); *see Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998). The Court must also dismiss a complaint when the Court lacks subject matter jurisdiction. *See Fed. R. Civ. P. 12(h)(3)*. While the law mandates dismissal on any of these grounds, the Court is obliged to construe *pro se* pleadings liberally, *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009), and interpret them to raise the “strongest [claims] that they suggest,” *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (internal quotation marks and citations omitted) (emphasis in original).

But the “special solicitude” in *pro se* cases, *id.* at 475 (citation omitted), has its limits – to state a claim, *pro se* pleadings still must comply with Rule 8 of the Federal Rules of Civil Procedure, which requires a complaint to make a short and plain statement showing that the pleader is entitled to relief.

Rule 8 requires a complaint to include enough facts to state a claim for relief “that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible if the plaintiff pleads enough factual detail to allow the Court to draw the inference that the defendant is liable for the alleged misconduct. In reviewing the complaint, the Court must accept all well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). But it does not have to accept as true “[t]hreadbare recitals of the elements of a cause of action,” which are essentially just legal conclusions. *Twombly*, 550 U.S. at 555. After separating legal conclusions from well-pleaded factual allegations, the Court must determine whether those facts make it plausible – not merely possible – that the pleader is entitled to relief. *Id.*

BACKGROUND

Plaintiff filed this complaint against the State of New York; the New York State Department of Health; the “New York State Police Department”; and the Federal Communications Commission (“FCC”). (ECF 1 at 1.) The following facts are drawn from the complaint, regarding events alleged to have occurred between January 2022 and November 2023. According to Plaintiff, his “cognitive function was virtually mapped to a cloning or macro program that records audio, visual, and facial recognition data to a learning software powered by Artificial Intelligence.” (*Id.* at 3.) On five occasions, Plaintiff contacted local law enforcement. When he finally had an opportunity to speak with the police, they “chuckled, denied knowing S2BN Entertainment or Steve Rath, said they could not report it without proof or evidence,” and refused to do an investigation. (*Id.* at 5.) Plaintiff was apparently taken to Harlem Hospital and

held for five days “without actual cause,” and they “attempted to give [him] antipsychotic meds.” (*Id.*) It appears that a similar incident happened at Columbia Presbyterian, but it is not clear when. (*Id.*) Plaintiff asserts claims of

Human trafficking, voyeurism, breaking and entering, police brutality, sexual exploitation, extortion, fraud, theft, slavery, battery, tampering and manipulation of evidence, stalking, unwarranted tapping, false detainment, theft of intellectual property, racketeering with the attempt to remove all documentation pertinent to case, torture, menacing, forgery, violation of [HIPAA], discrimination, harassment, negligence, endangerment, defamation, unlawful investigation and background check, mutilation, invasion of privacy, cognitive data theft, involuntary servitude, kidnapping, pharmaceutical and medical malpractice.

(*Id.* at 3.)

In the “Injuries” section of the complaint, Plaintiff recounts the following:

Four fillings, two teeth, auditory hallucinations, palpitations, dyspnea, numbness of foot, psychosis, chest pain, jaw pain, cyst in lower back, penial cyst, conductor scars on genital and anal area, electric burn from prolonged usage of tapping, electrically powering body to run off brain functions. Family distress and discourse, emotional distress, spinal cord relocation, skull relocation, cartilage relocation, mold toxicity, reproduction of skin, peripheral vascular disease.

(*Id.* at 6.)

Plaintiff seeks various forms of relief, including: the “financial[] repair [of] all debt that was incurred during the years associated with this case,” including “credit cards, medical, rent, property damages and taxes”; a correction of “any false blame or accusations that occurred in [his] name”; the “reporting of [his] cognitive data that was taken during this time”; a statement explaining “why [he] would have been absent from any day-to-day events that would have otherwise been expected”; and “confirmation that all parties that committed acts have been detained or prevented from committing the acts in the future.” (*Id.* at 7.)

DISCUSSION

A. New York State and its agencies

The Court construes Plaintiff's claims that New York State, the New York State Department of Health, and the New York State Police violated his constitutional rights as arising under 42 U.S.C. § 1983. To state a claim under Section 1983, a plaintiff must allege both that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the right was violated by a person acting under the color of state law, or a "state actor." *West v. Atkins*, 487 U.S. 42, 48-49 (1988).

"[A]s a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity, or unless Congress has abrogated[d] the states' Eleventh Amendment immunity. . . ." *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009) (internal quotation marks and citation omitted, second alteration in original). This immunity shields States from claims for money damages, injunctive relief, and retrospective declaratory relief. *See Green v. Mansour*, 474 U.S. 64, 72-74 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984). "The immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." *Id.*; *see Capers v. Kirby Forensic Psychiatric Ctr.*, No. 13-CV-6953 (AJN), 2016 WL 817452, at *1 (S.D.N.Y. Feb. 25, 2016) (holding that the New York State Office of Mental Health is an agency of New York State).

Congress has not abrogated the States' immunity for claims under Section 1983, *see Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990), and the State of New York has not waived its immunity to suit in federal court, *see Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977). The Eleventh Amendment therefore precludes Plaintiff's claims

under Section 1983 against the State of New York, the New York State Department of Health, and the “New York State Police.”

Accordingly, the Court dismisses Plaintiff’s claims under Section 1983 against the State of New York and its agencies under the doctrine of Eleventh Amendment immunity, *see* § 1915(e)(2)(B)(iii), and consequently, for lack of subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(h)(3); *Close v. New York*, 125 F.3d 31, 38-39 (2d Cir. 1997) (“[U]nless New York waived its immunity, the district court lacked subject matter jurisdiction.”); *Atl. Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 4 (2d Cir. 1993) (“Although the parties do not address the Eleventh Amendment in their briefs, we raise it *sua sponte* because it affects our subject matter jurisdiction.”).

B. New York City and its agencies

The complaint contains facts suggesting that Plaintiff may seek to sue New York City, the New York City Police Department (“NYPD”), area hospitals, and the New York City Department of Health and Mental Hygiene (“DOHMH”).

Any claims Plaintiff is asserting against the NYPD must be dismissed because the NYPD, like most agencies of the City of New York, is not a suable entity. N.Y. City Charter ch. 17, § 396 (“[A]ll actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the city of New York and not in that of any agency, except where otherwise provided by law.”); *Jenkins v. City of New York*, 478 F.3d 76, 93 n.19 (2d Cir. 2007); *see also Emerson v. City of New York*, 740 F. Supp. 2d 385, 396 (S.D.N.Y. 2010) (“[A] plaintiff is generally prohibited from suing a municipal agency.”).

The DOHMH, on the other hand, is a city agency that can be sued. *See* N.Y. City Charter, Ch. 22, § 564 (“The department may sue and be sued in and by the proper name of ‘Department of Health and Mental Hygiene of the City of New York.’”); *Rivera v. Bloomberg*, Nos. 11-CV-

629, 11-CV-4325 (PGG), 2012 WL 3655830, at *11 (S.D.N.Y. Aug. 27, 2012) (holding that DOHMH is a suable entity). When a plaintiff sues a municipality or a municipal agency under Section 1983, however, it is not enough for the plaintiff to allege that one of the municipality's employees or agents engaged in some wrongdoing. The plaintiff must show that the municipality itself caused the violation of the plaintiff's rights. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011) ("A municipality or other local government may be liable under this section [1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978)); *Cash v. Cnty. of Erie*, 654 F.3d 324, 333 (2d Cir. 2011)). In other words, to state a Section 1983 claim against a municipality, the plaintiff must allege facts showing (1) the existence of a municipal policy, custom, or practice, and (2) that the policy, custom, or practice caused the violation of the plaintiff's constitutional rights. *See Jones v. Town of East Haven*, 691 F.3d 72, 80 (2d Cir. 2012); *Bd. of Cnty. Comm'r's v. Brown*, 520 U.S. 397, 403 (1997) (internal citations omitted).

Plaintiff does not assert any facts suggesting that a municipal policy, custom, or practice caused the violation of his constitutional rights. The Court grants Plaintiff leave to provide facts in an amended complaint that support a claim against the City of New York and/or DOHMH.

C. The FCC

The Court must dismiss Plaintiff's claims against the Federal Communications Commission ("FCC) under the doctrine of sovereign immunity. This doctrine bars federal courts from hearing all suits against the federal government, including suits against any part of the federal government, such as a federal agency, except where sovereign immunity has been waived. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir.

1994) (“Because an action against a federal agency or federal officers in their official capacities is essentially a suit against the United States, such suits are . . . barred under the doctrine of sovereign immunity, unless such immunity is waived.”).

The Federal Tort Claims Act (“FTCA”) provides for a waiver of sovereign immunity for certain claims for damages arising from the tortious conduct of federal officers or employees acting within the scope of their office or employment. *See 28 U.S.C. §§ 1346(b)(1), 2680.* A plaintiff must comply with the FTCA’s procedural requirements before a federal court can entertain his claim. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999), *abrogated on other grounds*, *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015). “The proper defendant in an FTCA claim is the United States, not individual federal . . . agencies.” *Holliday v. Augustine*, No. 3:14-CV-0855, 2015 WL 136545, at *1 (D. Conn. Jan. 9, 2015). The Court therefore construes Plaintiff’s claims for damages against the FCC as ones brought under the FTCA against the United States.

Before bringing a claim in a federal district court under the FTCA, a claimant must first exhaust his administrative remedies by filing a claim for damages with the appropriate federal government entity and must receive a final written determination. *See 28 U.S.C. § 2675(a).* Such an administrative claim must be in writing, specify the amount of damages sought, and be filed within two years of the claim’s accrual. 28 U.S.C. §§ 2401(b), 2675(a). A claimant may thereafter challenge the Government’s final denial in a federal district court by filing an action within six months after the date of the mailing of the notice of final denial by the federal entity. *See § 2401(b).* If no written final determination is made by the appropriate federal entity within six months of the date of the claimant’s filing of the administrative claim, the claimant may then bring an FTCA action in a federal district court. *See § 2675(a).* While this exhaustion

requirement is jurisdictional and cannot be waived, *see Celestine v. Mount Vernon Neighborhood Health Ctr.*, 403 F.3d 76, 82 (2d Cir. 2005), “the FTCA’s time bars are nonjurisdictional and subject to equitable tolling,” *Kwai Fun Wong*, 575 U.S. at 420.

To the extent that Plaintiff’s complaint could be construed as asserting a tort claim for damages under the FTCA, he has not alleged facts demonstrating that he filed an administrative claim under the FTCA with a federal government entity for damages and subsequently received a final written determination before bringing this action; he has also not alleged facts showing that it has not been more than six months since he has filed such an administrative claim.

D. Leave to amend

Plaintiff proceeds in this matter without the benefit of an attorney. District courts generally should grant a self-represented plaintiff an opportunity to amend a complaint to cure its defects, unless amendment would be futile. *See Hill v. Curcione*, 657 F.3d 116, 123-24 (2d Cir. 2011); *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988). Indeed, the Second Circuit has cautioned that district courts “should not dismiss [a *pro se* complaint] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.” *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (quoting *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999)). In an abundance of caution, and in light of Plaintiff’s *pro se* status, Court grants him 60 days’ leave to amend his complaint to detail his Section 1983 claims against any appropriate state actors, or FTCA claims against the United States, as outlined in this order.

In the “Statement of Claim” section of the amended complaint form, Plaintiff must provide a short and plain statement of the relevant facts supporting each claim against each defendant. If Plaintiff has an address for any named defendant, Plaintiff must provide it. Plaintiff should include all of the information in the amended complaint that Plaintiff wants the Court to

consider in deciding whether the amended complaint states a claim for relief. That information should include:

- a) the names and titles of all relevant people;
- b) a description of all relevant events, including what each defendant did or failed to do, the approximate date and time of each event, and the general location where each event occurred;
- c) a description of the injuries Plaintiff suffered; and
- d) the relief Plaintiff seeks, such as money damages, injunctive relief, or declaratory relief.

Essentially, Plaintiff's amended complaint should tell the Court: who violated his federally protected rights and how; when and where such violations occurred; and why Plaintiff is entitled to relief.

Because Plaintiff's amended complaint will completely replace, not supplement, the original complaint, any facts or claims that Plaintiff wants to include from the original complaint must be repeated in the amended complaint.

CONCLUSION

Plaintiff is granted leave to file an amended complaint that complies with the standards set forth above. Plaintiff must submit the amended complaint to this Court's Pro Se Intake Unit within sixty days of the date of this order, caption the document as an "Amended Complaint," and label the document with docket number 23-CV-10257 (LTS). An Amended Complaint form is attached to this order. No summons will issue at this time. If Plaintiff fails to comply within the time allowed, and he cannot show good cause to excuse such failure, the complaint will be dismissed for failure to state a claim upon which relief may be granted.

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore IFP status is denied for the purpose of an appeal. *See Coppededge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: January 29, 2024
New York, New York

/s/ Laura Taylor Swain

LAURA TAYLOR SWAIN
Chief United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

____ Civ. _____ (____)

(In the space above enter the full name(s) of the plaintiff(s).)

**AMENDED
COMPLAINT**

-against-

(In the space above enter the full name(s) of the defendant(s). If you cannot fit the names of all of the defendants in the space provided, please write "see attached" in the space above and attach an additional sheet of paper with the full list of names. The names listed in the above caption must be identical to those contained in Part I. Addresses should not be included here.)

Jury Trial: Yes No
(check one)

I. Parties in this complaint:

A. List your name, address and telephone number. If you are presently in custody, include your identification number and the name and address of your current place of confinement. Do the same for any additional plaintiffs named. Attach additional sheets of paper as necessary.

Plaintiff Name _____
Street Address _____
County, City _____
State & Zip Code _____
Telephone Number _____

B. List all defendants. You should state the full name of the defendant, even if that defendant is a government agency, an organization, a corporation, or an individual. Include the address where each defendant may be served. Make sure that the defendant(s) listed below are identical to those contained in the above caption. Attach additional sheets of paper as necessary.

Defendant No. 1	Name _____
	Street Address _____
	County, City _____
	State & Zip Code _____
	Telephone Number _____
Defendant No. 2	Name _____
	Street Address _____
	County, City _____
	State & Zip Code _____
	Telephone Number _____
Defendant No. 3	Name _____
	Street Address _____
	County, City _____
	State & Zip Code _____
	Telephone Number _____
Defendant No. 4	Name _____
	Street Address _____
	County, City _____
	State & Zip Code _____
	Telephone Number _____

II. Basis for Jurisdiction:

Federal courts are courts of limited jurisdiction. Only two types of cases can be heard in federal court: cases involving a federal question and cases involving diversity of citizenship of the parties. Under 28 U.S.C. § 1331, a case involving the United States Constitution or federal laws or treaties is a federal question case. Under 28 U.S.C. § 1332, a case in which a citizen of one state sues a citizen of another state and the amount in damages is more than \$75,000 is a diversity of citizenship case.

A. What is the basis for federal court jurisdiction? (*check all that apply*)

Federal Questions Diversity of Citizenship

B. If the basis for jurisdiction is Federal Question, what federal Constitutional, statutory or treaty right is at issue? _____

C. If the basis for jurisdiction is Diversity of Citizenship, what is the state of citizenship of each party?

Plaintiff(s) state(s) of citizenship _____

Defendant(s) state(s) of citizenship _____

III. Statement of Claim:

State as briefly as possible the facts of your case. Describe how each of the defendants named in the caption of this complaint is involved in this action, along with the dates and locations of all relevant events. You may wish to include further details such as the names of other persons involved in the events giving rise to your claims. Do not cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Attach additional sheets of paper as necessary.

A. Where did the events giving rise to your claim(s) occur? _____

B. What date and approximate time did the events giving rise to your claim(s) occur? _____

C. Facts: _____

What
happened
to you?

Who did
what?

Was anyone
else
involved?

Who else
saw what
happened?

IV. Injuries:

If you sustained injuries related to the events alleged above, describe them and state what medical treatment, if any, you required and received.

V. Relief:

State what you want the Court to do for you and the amount of monetary compensation, if any, you are seeking, and the basis for such compensation. _____

I declare under penalty of perjury that the foregoing is true and correct.

Signed this ____ day of _____, 20 ____.

Signature of Plaintiff _____

Mailing Address _____

Telephone Number _____

Fax Number (*if you have one*) _____

Note: All plaintiffs named in the caption of the complaint must date and sign the complaint. Prisoners must also provide their inmate numbers, present place of confinement, and address.

For Prisoners:

I declare under penalty of perjury that on this ____ day of _____, 20 ___, I am delivering this complaint to prison authorities to be mailed to the *Pro Se* Office of the United States District Court for the Southern District of New York.

Signature of Plaintiff: _____

Inmate Number _____